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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioner Stacey C. Koon respectfully files this memorandum in reply to the United States' brief in opposition to certiorari.

1. Question 1 -- The Standard of Review for Sentencing Guidelines Departures.

The United States asserts that "[t]here is . . . no . . . conflict" (Opp. at 11) between the Ninth Circuit's decision in this case concerning the appropriate standard of appellate review of a district court's departure from the Sentencing Guidelines and the First Circuit's decision in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). But nine of the judges of the court below concluded exactly the opposite, explaining that the First Circuit's "approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case." Pet. App. 90a (dissent from denial of rehearing *en banc*); *see also* Pet. 12-18; Br. *Amicus Curiae* of the Law Enforcement Legal Defense Fund 2-17; Br. *Amicus Curiae* of Nat'l Ass'n of Criminal Defense Lawyers 2-6.

The conflict among the circuits that is invisible to the United States could not be clearer: whereas the court below held that a district court's departure decision is to be reviewed *de novo*, Pet. App. 57a, the First Circuit held in *Rivera* that appellate courts must defer to a district court's decision to depart unless the

district court relied upon factors that are explicitly forbidden or discouraged by the Sentencing Guidelines. None of the factors considered by the district court here were either forbidden or discouraged, and one -- the victim's misconduct -- is actually *encouraged* by the Guidelines. Application of the *Rivera* approach to this case therefore would have precluded *de novo* review and instead required deference to the district court's discretionary judgments.

The United States offers a misleading excerpt from *Rivera* to support its claim that *Rivera* does not conflict with the decision below, arguing that all of the Ninth Circuit's sentencing rulings were "the kind of legal determinations that *Rivera* holds are subject to *de novo* review." Opp. at 11. According to the government, "[i]n *Rivera*, the First Circuit held that plenary review is appropriate 'where the question on review is simply whether or not the allegedly special circumstances (*i.e.*, the reasons for the departure) are of the "kind" that the Guidelines, *in principle*, permit the sentencing court to consider at all'." Opp. at 10-11 (quoting *Rivera*, 994 F.2d at 951). The United States contends that this sentence from *Rivera* means that courts of appeals have broad and plenary authority to create new, impermissible grounds for departure from the Guidelines, even if such factors have not been delineated in the Sentencing Guidelines. However, the remainder of the paragraph from which the government draws this inference makes it clear that the *Rivera* court was referring *only* to factors that are explicitly forbidden or discouraged by the Guidelines:

> [D]epartures for some reasons are "forbidden," and departures for certain other reasons are "discouraged" unless the case is out of the ordinary. Were a district court (1) to try to depart for a "forbidden" reason, or were it (2) to try to depart for a "discouraged" reason *without recognizing that it must explain how the case (compared to other cases where the reason is present) is special,* its departure would not be lawful. The district court has no special expertise in deciding whether a factor is "forbidden" or "discouraged." Hence, there is no reason to review such a decision with any "leeway" or "deference."

994 F.2d at 951 (citations omitted).

None of the "extraordinary factors" (Pet. App. 131a) considered by the district court here in making its 3-level downward departure were expressly "forbidden" or "discouraged," as those terms were defined in *Rivera*. Thus, the Ninth Circuit's *de novo* review of that departure flatly conflicts with *Rivera* and paves the way for highly inconsistent standards for the review of sentencing decisions in the federal courts.

With respect to the district court's 5-level departure for "victim misconduct," that factor is actually expressly *encouraged* by the Sentencing Guidelines, and there is no dispute that there was victim misconduct in this case within the meaning of the Guidelines. Among other things, Mr. King "resisted and evaded arrest, persistently failed to comply with police commands" and "attempted to escape." Pet.

App. 122a. The district court therefore found as a matter of fact that "Mr. King's wrongful conduct contributed significantly to provoking the offense behavior." Pet. App. 121a. Indeed, the district court specifically found that the "incident . . . would not have occurred at all, but for Mr. King's initial misconduct," and that his wrongdoing therefore played a "substantial role . . . in bringing about the defendants' unlawful conduct," removing this case from the "heartland" of offenses contemplated by the pertinent guidelines relating to excessive force. Pet. App. 123a-124a.

Although the court of appeals overrode the district court's finding that the facts of this case made it so unusual as to justify a downward departure for victim misconduct, it acknowledged that other facts -- "for example, where the victim kills or wounds the officer's partner in his presence" -- might remove an excessive force case from the "heartland" and provide the basis for a victim misconduct departure. Pet. App. 76a n.38. Thus, the Ninth Circuit's review of the victim misconduct departure was not "quintessentially legal," as that term was used by *Rivera;* if anything, it was quintessentially factual, *see* Pet. App. 88a (dissent from the denial of rehearing *en banc*) ("the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart"), as is the government's effort to distinguish *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). Under *Rivera*, the district court's "determinations of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary'" were entitled to

deference and "respect," not subject to plenary review. 994 F.2d at 952. And the Eighth Circuit insists that appellate courts should "accord great deference" to such departure decisions. *Yellow Earrings*, 891 F.2d at 654-55.

The Ninth Circuit's *de novo* review standard here is inconsistent with the limited role of appellate courts under the Sentencing Guidelines, *see Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992), and sharpens a conflict among the circuits concerning the constantly recurring question of the proper standard for appellate review of sentencing departures. Review by this Court is therefore necessary and appropriate.

2. Question 2 -- The Requirements Under *Kastigar*.

The United States cannot and does not dispute that the decision below is in direct conflict with *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992), regarding the specific requirements that the government must meet under *Kastigar* v. *United States*, 406 U.S. 441 (1972), in order to rely upon testimony from a witness who has been exposed to the defendant's coerced statement. Opp. at 13-15. The Ninth Circuit expressly rejected the D.C. Circuit's approach in *North* and *Poindexter*, Pet. App. 18a-19a & n.13, and this Court should grant review to resolve the conflict and clarify the proper Fifth Amendment standards under *Kastigar*.

The United States argues that this Court should not eliminate the conflict among the circuits on the *Kastigar* issue, but its reasoning is flawed. First, the United States focuses on the fact that Sergeant Koon voluntarily testified in the state court trial, where Officer Briseno gave his "highly damaging" (Pet. App. 4a) testimony after having been exposed to Sergeant Koon's compelled statement. Relying upon *dicta* in a footnote, the United States argues that "the D.C. Circuit implied in *North II* that its rule would not apply when a defendant voluntarily testifies to events he has previously discussed under compulsion." Opp. at 14. There is, however, a fundamental and insurmountable problem with this logic: the defendant in *North himself* voluntarily testified at his trial as to events he had previously discussed under compulsion before Congress. And the D.C. Circuit has never in any other case suggested that its *Kastigar* standard is rendered inapplicable where a defendant voluntarily testifies at trial but continues to object to the use of a previously given compelled statement.

Second, the United States argues that, because the district court purported to apply the D.C. Circuit standard in holding that Officer Briseno's testimony was admissible, Sergeant Koon "cannot benefit from an application of the D.C. Circuit standard" here. Opp. at 14. That argument is specious. The Ninth Circuit declined to address the question whether the district court's interpretation and application of the D.C. Circuit's standard were correct because it rejected the D.C. Circuit's standard and affirmed the district court's decision under the Ninth Circuit's far more lenient standard. Indeed, the court below clearly

perceived that the D.C. Circuit's standard would make a significant difference in this case, going to great lengths to distinguish its *Kastigar* requirements from those of the D.C. Circuit and pointedly to state that the rules laid down in *North* and *Poindexter* "are not the law of [the Ninth] circuit." *See* Pet. App. 18a; *id.* 17a-19a.

Finally, the United States argues that "*North* and *Poindexter* both involved immunity conferred by federal statute" and suggests that the rigorous Fifth Amendment standard developed in that context should not apply where police officers are compelled to give testimony pursuant to "so-called *Garrity* immunity." Opp. at 14. But this argument cannot be squared with *Garrity* itself, which teaches "that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Even the Ninth Circuit rejected the notion that "the showing required under the Fifth Amendment varies depending on the situation in which the testimony was compelled. The Fifth Amendment protects defendants from the use of their compelled statements regardless of when or where the statements were taken." Pet. App. 19a n.13; *see also* Brief of *Amicus Curiae* National Association of Police Organizations, Inc. at 3-8.

3. Question 3 -- The Proper Fourteenth Amendment Standard in Excessive Force Cases.

Relying on *Graham* v. *Connor*, 490 U.S. 386, 395-97 (1989), the government contends that the jury was properly instructed that Sergeant Koon could be found

to have violated Mr. King's Fourteenth Amendment substantive due process based merely upon his failure "to protect [Mr.] King from the use of unreasonable force." Opp. at 16. *Graham*, however, involved a violation of the *Fourth Amendment*, not the Fourteenth Amendment. The "objective unreasonableness" standard articulated in *Graham* applies only in the Fourth Amendment context; indeed, the *Graham* Court itself recognized that a more stringent standard -- "excessive force that amounts to punishment," 490 U.S. at 395 n.10 -- was applicable in the substantive due process context.

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The government nonetheless argues that the "objective unreasonableness" standard should govern substantive due process violations during arrests, and attempts to distinguish *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991), on the grounds that the "shock[s] the conscience"/"intended as punishment" standard applied in that case was in the context of a pretrial detainee. The *Cobb* court, however, correctly understood *Graham* to mean that the source of the proper standard to be applied in an excessive force case is the constitutional provision relied upon by the government in prosecuting the defendant. *See* 905 F.2d at 788 ("We begin our analysis where we must, 'by identifying the specific constitutional right allegedly

infringed by the challenged application of force.'") (quoting *Graham*, 490 U.S. at 394).[1]

Here, as in *Cobb*, the government indicted and prosecuted Sergeant Koon *only* for violations of the Fourteenth Amendment and it is that constitutional provision -- not the Fourth Amendment -- that provides the proper standard for determining whether there was an excessive force violation.

4. Question 4 -- The Double Jeopardy and Due Process Implications of the Successive Prosecutions.

The government does not dispute that this case properly presents the question whether the federal prosecution of Sergeant Koon after his acquittal by a state court on substantially identical charges, violates either the Double Jeopardy Clause or the Due Process Clauses of the Fifth and Fourteenth Amendments. Extraordinary political pressure, resulting from four days of rioting and looting that resulted in fifty-three deaths, hundreds of injuries and destruction of more than $1 billion in property, including over 5,000 buildings -- led to the federal prosecution of Sergeant Koon following his acquittal in state court. "The state of California vigorously prosecuted Koon . . . , and

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[1] "The validity of the claim must . . . be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Graham*, 490 U.S. 394.

lost." Pet. App. 130a. The United States then prosecuted him for "[t]he same underlying conduct." *Id.* The second jury heard the evidence and deliberated with the fullest and most immediate knowledge that massive rioting and looting were the direct consequences of the first acquittal and were the likely consequences of a second one. This case illustrates how vital the constitutional protections against multiple prosecutions are to unpopular defendants.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant certiorari and set this case for plenary consideration.

June 26, 1995

Respectfully submitted,

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